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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH E. WATSON, Defendant and Appellant.	A123732 (San Mateo County Super. Ct. No. SC061877)

I. INTRODUCTION

Kenneth E. Watson (Watson) appeals from his conviction of first degree murder. He argues his trial attorney provided ineffective assistance of counsel, he was denied his right to a speedy trial, the court erred in admitting certain evidence, and the court erred in denying his motion for new trial. We affirm.

II. PROCEDURAL BACKGROUND

On August 29, 2006, the San Mateo County District Attorney charged Watson by information with the first degree murder of Damon Whitney. (Pen. Code, § 187, subd. (a).)[1] The information also alleged he intentionally killed Whitney by discharging a firearm from a vehicle (§ 190.2, subd. (a)(21)), intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), personally used a firearm (§ 1203.06, subd. (a)(1)), personally inflicted great bodily injury (§ 1203.075, subd. (a)(1)), and had a prior juvenile adjudication and four prior felony convictions for which he served prison terms (§§ 1170.12, subd. (c)(1), 667.5, subd. (b)).

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Following a jury trial, Watson was convicted as charged. In a separate trial, the court found true the prior juvenile adjudication and felony convictions.

Watson filed a motion to set aside the verdicts based on the three-year delay between the murder and his arrest. He also filed a motion for new trial on the basis there was insufficient evidence to support the verdict and material new evidence was discovered after trial. The court denied both motions.

The trial court sentenced Watson to life imprisonment without the possibility of parole. This timely appeal followed.

III. FACTUAL BACKGROUND

Damon Whitney (Whitney) was killed on July 10, 2002.[2] He was shot in front of the home of Gus Porteous on Elder Street in Millbrae, and died at the hospital later that day.

Whitney and Watson both sold methamphetamine and associated with many of the same people, the majority of whom were involved in using or selling methamphetamine. Beginning on June 17, when Watson allegedly kidnapped his ex-wife and evaded police, he was the subject of a manhunt by local police and federal marshals. Sheriff's Detective Gary Ramos testified there was a "million dollar warrant" out for Watson's arrest.

Gus Porteous was a longtime friend of Whitney's. In the month before Whitney's death, Whitney had no permanent residence and stayed "off and on" at Porteous' Elder Street home in Millbrae. At that time, Porteous was a daily methamphetamine user.

On the night of July 9, Porteous rented a Ford Expedition for Whitney to use to deliver methamphetamine. Whitney had a black GMC Yukon that he planned to relinquish as collateral for the purchase of six pounds of methamphetamine, until he returned with the money from the methamphetamine sales.

Around midnight, Porteous was inside his residence waiting for Whitney to arrive. He heard Whitney, whose Yukon was "very loud and very distinct," pull into the carport. The SUV "never turned off, and then [Porteous] heard him reverse and the sound got

[2] Unless otherwise noted, all undesignated dates are in 2002.

lighter . . . ." Porteous then heard four to five gunshots. He heard the SUV door open and saw Whitney at his back door via a video camera outside the door.

Porteous opened the door and saw Whitney "with blood covering his face and his shoulder, and . . . the bridge of his nose almost gone." Whitney stumbled in and "almost collapsed by the couch." He got up, splashed water on his face in the kitchen, then walked to the back room and collapsed next to Porteous' bed. Porteous asked him "Was it Ken [Watson]?" and if he should call 911. Whitney responded " 'hurry up.' " Porteous called 911 and stayed on the phone with the dispatcher until police arrived.

Around midnight on July 9, Thad Youngquist, a neighbor on Elder Street, was smoking on his front porch with his wife. He heard "one pop, followed by three rapid succession pops" that he recognized as gunfire. He looked northbound on Elder and saw a vehicle speeding down the road toward his house. Youngquist stepped toward the street, and was about 10 feet away from the curb line when the vehicle passed. The vehicle was a "champagne or gold" Ford Explorer with tinted windows in the back passenger and cargo area. Youngquist saw the driver through the open passenger-side window. The driver appeared to be male and the sole occupant. The Explorer slowed but did not stop at the intersection of Elder and Millbrae, and turned west onto Millbrae Avenue. Youngquist could not make out a license plate number, but saw one of the tail signals was out.

Porteous had reason to ask Whitney if Watson shot him: he knew Watson had threatened Whitney the day before. On the evening of July 8, Whitney was at Joe Dichoso's apartment on 16th Avenue in San Mateo watching television with a group of people. Renee Geddling, Grady Brahy, Michelle Cleary, Nicholas Manuel, and Tiffany Webster were also there, and the group had taken methamphetamine earlier. A window was open, but covered with a screen. "[A]ll of a sudden . . . [Watson] came through the window and the blinds and the screen. . . . [He] took the blinds and everything with him [and] [l]anded standing up with the gun in his hand and a knife in the other hand." Watson pointed the gun at Whitney and demanded his drugs and money. Whitney responded " 'Please . . . don't kill me. Don't shoot me.' " Watson seemed "angry or just

almost—crazed in a way." Watson asked Brahy where Whitney's drugs and money were, and Brahy told him Whitney did not have any. Dichoso testified Whitney sometimes kept drugs at the apartment. Watson turned and pointed the gun at Manuel and asked " 'who's this?' " Manuel did not answer, but Brahy told Watson his name. Manuel "saw him trying to cock the gun," but he did not see a bullet come out. Watson "looked at [Whitney] and said, 'I can find you any time, anywhere. Next time I catch you alone, you're dead.' " Watson then ran from the apartment. No one at the apartment called police because they were all involved with drugs.[3]

Brahy and Geddling spent the night of July 8 at Dichoso's apartment. The next day, Brahy found a bullet on the kitchen floor of Dichoso's apartment with foreign writing on the head. He was puzzled because he "saw [Watson] fiddle with the gun, but [he] didn't see a bullet come out." He showed it to Dichoso and Geddling, then put it in a baggie and placed it in the glove compartment of Geddling's car. The day after Whitney was shot, police called Brahy and asked him to come to Dichoso's apartment. He retrieved the bullet from the glove compartment of Geddling's car and brought it to police.

Dichoso believed he first met Watson when he showed up at Dichoso's apartment with Andy Quintero about a month before Whitney's murder. Ryan Stoll, Whitney and Geddling were already there. Watson had a knife, and Quintero was armed with "some kind of a pipe." Quintero "hit [Stoll] a couple of times and took his money and his drugs." While this was happening, Watson held his knife up against Dichoso's arm and told him to stay still. Watson admitted he robbed Stoll of a pound of methamphetamine.

Watson and Whitney had another encounter about a week before the murder. Whitney was at the Larkspur Landing Hotel in South San Francisco with Renee Geddling and Grady Brahy. Watson "showed up," and had a heated discussion with Whitney "about respect and something having to do with . . . [Whitney] not showing him any

[3] Webster, Dichoso, Geddling, Brahy, and Manuel, all testified regarding that incident, and their testimony was consistent regarding Watson brandishing a gun, pointing it at Whitney, and threatening to kill him.

respect and he needed to respect him." Watson stated " 'I respect everybody's game and, Damon [Whitney], you don't respect nobody.' " "Game" could mean "how you . . . handle things or deal with people," and it could mean dealing drugs.

On July 1, about two weeks before the killing, Watson stole Whitney's Yukon which contained drugs, money, a gun and his dog. Whitney got the SUV back, but the drugs and money were gone. Watson testified he robbed Whitney because "other people had robbed him before and said it was really easy. . . . You didn't have to harm him. He was just easy pick'ens."

At the time of the killing, there was a "million dollar warrant" for Watson's arrest based on his alleged kidnapping of his ex-wife and evading police on June 17. Watson began "hang[ing] out" with acquaintance Brian Chaney (Chaney), who was also wanted by the police, and his girlfriend Megan Morton-Davidson (Davidson). In July 2002, Chaney and Davidson were using methamphetamine and staying at various people's houses. Davidson drove a champagne or gold Ford Explorer with tinted back windows owned by her family. She often drove Chaney and Watson in the Explorer while they stayed in the back seat. Because both men were wanted by police they frequently moved to different houses but tried not to drive, so as not to draw attention to themselves.

The trio often stayed at Kirsten Bell's[4] house on Foothill in Redwood City (the Foothill house), which was used as a "party house" where people used methamphetamine when Bell's mother was out of town. They considered the Foothill house "safe," meaning it was "[n]ot on any law enforcement's radar."

On the evening of July 8, Davidson drove Watson to Dichoso's apartment. She and Chaney waited in the car for Watson "to take care of something really quick." She did not ask Watson what he was doing. He came back after about 10 minutes, and they drove away.

On the afternoon of July 9, Davidson drove Watson to the Foothill house. While they were there with Chaney, Watson showed Davidson a silver handgun. Watson asked

[4] Bell testified her maiden name was Bolton, and she was referred to by that name in some of the briefs and at oral argument.

Davidson if he could borrow her Explorer for an errand. Davidson had to talk to Chaney about it, because any decisions were "a mutual thing." Watson told her Chaney felt it was "fine" if he borrowed Davidson's Explorer. Watson left wearing tan shorts, a red and white shirt, and red and white "Michael Jordan" socks. He was not dirty, and had no scratches or bruises. After Watson left in the car, Chaney told Davidson he had not told Watson he could take the Explorer. They waited at the Foothill house for Watson to return, but he never did.

Bell testified that on July 9, Watson asked her and Davidson to collect $3,000 from Jorge Bandala. They drove to Bandala's home in Davidson's Explorer, but only received $28. Watson was angry, and asked Davidson if he could borrow the Explorer to get the money himself. He left in Davidson's Explorer. When Watson left, he was clean and had no scratches or injuries on his face, arms or legs. He was wearing tan khaki shorts and a white and red shirt. Later that evening, Watson telephoned Bell who screamed "Where are you?" Watson said "I'm gone" and hung up.

At some point after Watson left, "someone had called and said that there [were] house raids and it was one step behind where [Watson] was." Davidson, Chaney, Bell and one or two other females were picked up by someone and taken to another house in Redwood City. The residents of that home did not want Davidson and Chaney inside the house. Davidson, in a "call of desperation," telephoned a girl she had not spoken with for years and asked for a ride. The girl picked her and Chaney up and drove them to Michael Bound's house on Cipriani in Belmont. That evening, Davidson, Chaney and Bound went out in his mother's car looking for the Explorer, but they did not find it.

Bound testified Watson came to his house at about 7:00 p.m. on July 9, driving a Ford Explorer. He "[h]ung out for a little while and made a few phone calls," then left alone in the Explorer, after telling Bound not to tell anyone he was there. Bound did not notice any scratches or injuries on Watson, and recalled he was wearing khaki shorts.

Later that evening, Chaney and Davidson called and wanted Bound to pick them up, but Bound would not. Chaney and Davidson arrived at his home later, and wanted Bound to give them a ride to look for Watson and the Explorer. Bound did not tell them

Watson had been there earlier. All three went out twice that evening searching for the Explorer, but did not find it. They returned to Bound's home to sleep.

The next morning, Bound learned police were surrounding his house. He turned on the television and saw news reports of the Explorer being towed. Chaney telephoned someone he knew in the police department, and was told police were going to "kick in the door."

When Davidson woke on July 10 at Bound's home, she saw her Explorer on the news with police around it. The news report did not mention a shooting. Later that morning Bound's house was surrounded by a SWAT team. Davidson, Chaney, Bound and Bound's mother came out of the house with their hands up. Police took Davidson to the Belmont police station where she first learned about the shooting.

The Highway Patrol found Davidson's Ford Explorer about 2:00 a.m. on July 10 on the side of eastbound Highway 92 between Highway 280 and Ralston, in a rural area covered with brush. The Explorer was out of gas, and the engine was still warm. Officers had a police dog scent the inside. The dog tracked the scent eastbound on Ralston, then on Cipriani in Belmont.

The Explorer was towed to a police storage facility. Police searched and tested the car and found gunshot residue on the driver's side door and dashboard and four 9-millimeter bullet casings in the cabin. Three of the casings had foreign characters on the head stamp. Police also found two folding knives and a pack of Camel cigarettes, the brand Watson smoked.

Bell testified she returned to her mother's Foothill house the morning of July 10 with Gina Zuniga and Monica Gonzalez. As they approached the house, Zuniga "screamed that she saw a hand" near one of the front windows. They knew someone had entered the house because the "bottom lock was locked" and Bell did not have a key for that lock. After getting the key from a neighbor, they went inside. There was "[m]ud everywhere" in the bathroom. "It looked like the shower had been run and there was dry mud on the bottom of the shower." The kitchen window was open with the screen removed, and a chair was outside under the window.

There was "stuff everywhere" in Bell's bedroom that had not been there when she left. Gonzalez found a bullet on Bell's bedroom floor. There was also a pile of muddy, wet clothing Bell recognized as belonging to Watson. There was a red and white shirt, and a pair of tan shorts. Bell found a handwritten note from Watson saying "the truck had run out of gas on [Highway] 92, and that he was sorry for leaving the house a mess." Bell believed it was signed "Ken." Zuniga also saw part of the note, and remembered it said " 'Took some stuff. I owe you. Love Ken.' "

Bell called Bandala and he told her there had been a shooting. Bell turned on the television and saw something related to Watson and the shooting. Bell tore up the note and flushed it down the toilet because she "did not want any part of this . . . [¶] [w]hatever had happened previously . . . I didn't want my house to be connected to it." She put the clothes in a bag because she wanted "[t]o get rid of them."

Bell decided to call the police and report a burglary of her mother's house. She dumped the clothing out of the bag onto her bedroom floor before the police arrived. Even though she suspected Watson had broken into the house because the clothes were his, she did not mention that to police because she "had always been involved in gangs and drug dealers, and . . . was not going to so-called snitch on anybody."

Redwood City Police Officer Derrick Metzger responded to the call at about 10:00 a.m. on July 10. Bell told him she and her mother lived at the home, and that her mother was returning in a day or two from a vacation. Metzger observed the house was in disarray and appeared as though a party had been held there. There was mud and leafy debris on the kitchen window sill, kitchen sink area and in the bathroom. Bell reported nothing missing, but showed Metzger a pile of clothing in her bedroom and stated "she absolutely didn't want any of the stuff left there." Metzger suspected Bell had parties while her mother was gone, and "probably knew who the person was who had actually come into her residence and that she might not be telling me the entire story." He confronted Bell with these suspicions, and she admitted having parties but denied she knew who had broken in. As Metzger picked up the clothing, he noticed a bullet on the ground. He took all the clothing and the bullet to the police station, where he examined

them. Metzger determined the items had no evidentiary value in regard to the alleged burglary because of their "wet and dirty state," and he did not believe a burglary had been committed, so he put the items in a police dumpster in a gated and locked area. Metzger believed Bell was not telling him the whole truth, and was "trying to lay some sort of groundwork to explain the state of her house when mom returned."

About three hours later that day, another officer asked Metzger about the call to the Foothill house, and told him police had information that Watson, for whom police were searching, may have been staying at that house. Metzger went to the dumpster and retrieved the bag with the items from Bell's house. The bullet was a nine millimeter with foreign writing on it of a type Metzger had never seen before. The dumpster had been empty when Metzger put the bag in it, and contained nothing but the bag, which appeared untouched, when he retrieved it. A sample of genetic material was retrieved from the crotch of a pair of shorts taken from the Foothill house, and police identified Watson's DNA and the DNA of another individual.

A firearms identification and ballistics expert examined the bullets found in the Explorer, at Dichoso's apartment and at the Foothill house. The four shell casings found in the Explorer all had "nine millimeter hemispherical firing pins," which indicated they could have been fired by the same gun, though the expert could not make a conclusive determination. Three of the casings were "Egyptian, military surplus manufacture." The fourth was manufactured by the Federal Cartridge Company. The bullet found at the Foothill house on July 10 and the bullet found at Dichoso's apartment on July 9 were also manufactured by the Egyptian military, and had identical head stamps as the Egyptian casings found in the Explorer. These Egyptian bullets, which had non-English writing on them, were uncommon in the United States. The firearm expert had never seen that type of bullet in his 12-year career, and had consulted an out-of-state expert to determine its origins. The firearm expert examined the bullet removed from Whitney's skull during the autopsy, and determined it was the same caliber with the same number of grooves as the other bullets, but could not conclude it was necessarily fired from the same gun.

Watson testified at trial and denied killing Whitney. He testified there was an extensive manhunt underway for him in the weeks preceding Whitney's death, and he spent his nights at various "safe houses." He admitted jumping through the window into Dichoso's apartment to rob Whitney on July 8, but testified he only had a knife, not a gun. Watson also denied threatening to kill Whitney, or telling him he could find him "any place, any time." He testified that Webster, Dichoso, Geddling, Brahy, and Manuel were all lying when they testified he had a gun on July 8, pointed it at Whitney, or threatened him.

Watson testified about borrowing Davidson's Explorer. He was at the Foothill house on July 9, and had asked Bell and Davidson to retrieve $3,000 that Bandala owed him. When they returned without that sum, he was "frustrated." He testified he took a shower and put on blue jeans and a button down collared shirt, then asked Davidson to borrow her Explorer to get the money from Bandala himself.

Watson drove to Bandala's house in San Mateo. He knocked on the door, but there was no answer. Watson was "very upset" and called the Foothill house. Bell answered, and Watson heard giggling in the background. He felt paranoid because the U.S. Marshalls were getting close, and he believed "someone close to me was giving up information." Watson said "I'm gone" and hung up the phone.

While Watson was outside Bandala's home, Ryan Stoll arrived on his motorcycle. Stoll was part of the group involved with methamphetamine, and though Watson had previously robbed him, they were still on good terms. Stoll wanted to buy marijuana from Bandala, but Watson told him Bandala was not there. Stoll told him he had been pistol-whipped by Whitney and two other men, and talked about retaliating. Watson asked him if he was going to the Foothill house. When Stoll responded he was, Watson gave him the keys to the Explorer and asked him to give them to Davidson.[5]

[5] Edgar Donis, a friend of Watson's with a recent felony conviction for drug sales and filing a false police report, testified he saw Ryan Stoll driving a gold Explorer on one occasion prior to Whitney's murder.

Watson called his uncle, Greg Watson, for a ride sometime after 5:00 p.m. At the time, Greg Watson was a drug-addicted "street person" with a criminal history but was "someone [Watson] trusted at this moment in time." His uncle picked up Watson from Bandala's and drove him to San Francisco, stopping along the way to pick up his friend Kimble Murray, who died before trial. They went to the home of Lucille Vaden, Watson's aunt, who passed away before trial. Her son Danny Vaden lived with her at the time, but he also died before trial. Watson testified he spent the night of July 9 at Lucille Vaden's.

On the morning of July 10, his uncle picked him up and took him to the home of Michael Scott, Watson's godfather. Watson stayed there during the day, then took a bus and BART to Berkeley to find his friend Lavell. Lavell did not want him staying there, so he got a hotel room in Richmond the night of July 10. He changed hotels, getting a ride to a Holiday Inn in Oakland for the next evening. Watson registered at both hotels under false names and paid cash.

On July 12, Watson went back to Lavell's home in Berkeley and sat in a van outside. He stepped out of the van to get ice cream, and was arrested on the kidnapping and evading police charges both of which allegedly occurred on June 17. He testified the scratches on his body when he was arrested were the result of running through the bushes from law enforcement on July 4 and 5.

Watson pleaded guilty to evading a police officer and was sentenced to prison, to be released in November 2005. The kidnapping charges were dismissed. In November 2005, prior to being released from prison, Watson was arrested for Whitney's murder.

Watson wrote letters to a number of people while he was incarcerated. In a letter to Zuniga, Watson wrote "[T]ell Kirsten [Bell] I have <u>real</u> love for everything she did for me and my dogs! You are all <u>true</u> ridas! Tell all my Black [and] Brown dogs that even though I never wanted it to be this way, I have at least made it known who we are, and that we will not have our families harmed by outsiders! We are all good, hardworking men who deserve respect." Watson wrote to Christine Dudley "[T]hey are trying to stick

enough charges on me to give me life 100x's over, but I've been here before, and I'll beat it again! I've never been convicted of something I didn't do. And anything else they want to get me for has to be proven. The boy who got killed was no angel though. He tried to rob me and Juice's spot. He pistol-whipped one of our partners, and threatened me, Black, [and] Juice. No one threatens my family."

IV. DISCUSSION

A. Assistance of Counsel

Watson claims his trial counsel was ineffective for a host of reasons. In order to demonstrate ineffective assistance of counsel, "a defendant must show that counsel's performance was inadequate when measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case in such a manner that his representation 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' (S*trickland v. Washington* (1984) 466 U.S. 668, 686 . . . .)" (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1333.) " 'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny [citation]' . . . . 'Although deference is not abdication . . . courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' " (*Id.* at p. 1335, quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

"Defendant's burden is difficult to carry on direct appeal. We reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission." (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1148.) " 'In some cases, . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, *these cases are affirmed on appeal*.' [Citation.]" (*People v. Avena* (1996) 13 Cal.4th 394, 418-419, italics in original.) " '[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' " (*People v. Salcido* (2008) 44 Cal.4th 93, 172, quoting

People v. Hillhouse (2002) 27 Cal.4th 469, 502.) " 'A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1185, quoting *People v. Kelly* (1992) 1 Cal.4th 495, 520.) When defense counsel's reasons are not readily apparent from the record, we will not assume he or she was ineffective unless the challenged conduct could have had no conceivable tactical purpose. (*People v. Dickey* (2005) 35 Cal.4th 884, 926-927.)

Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, " ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' " (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

1. Claims of Ineffective Assistance of Counsel Based on Matters Outside the Record on Appeal

At the outset, we note many of Watson's claims of ineffective assistance of counsel are not cognizable on appeal because they raise issues regarding matters outside the record before this court. " '[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions,' claims of ineffective assistance of counsel generally must be raised in a petition for writ of habeas corpus based on matters outside the record on appeal." (*People v. Salcido*, *supra*, 44 Cal.4th at p. 172, citing *People v. Lopez* (2008) 42 Cal.4th 960, 972.)

Watson claims his counsel was ineffective in failing to adequately investigate potential exculpatory evidence, including possible third party culpability, failing to adequately advise him of the "possible negative consequences" of testifying, and failing to adequately prepare him to testify. The record does not reflect any of these asserted facts. There is simply no support for these claims of ineffective assistance.

2. Admission of Watson's Prior Convictions

Watson asserts his trial counsel was ineffective in failing to object to the admission of evidence of his prior felony convictions.

Any felony conviction necessarily involving moral turpitude is admissible to impeach a witness at a criminal proceeding. (*People v. Castro* (1985) 38 Cal.3d 301, 306; Cal. Const. art. I, § 28, subd. (f), par. (4).) "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . ." (Evid. Code, § 788.) In determining whether to admit evidence of a prior conviction, the trial court first determines whether the prior conviction involves moral turpitude, and then may exercise its discretion under Evidence Code section 352. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) In exercising its discretion, the court considers four factors " (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. [Citation.] These factors need not be rigidly followed." (*People v. Mendoza, supra*, 78 Cal.App.4th at p. 925.)

Watson's claim of ineffective assistance in regard to evidence of his prior convictions is unfounded. His trial counsel *did* object to admission of the bulk of the convictions. The prosecutor moved in limine to impeach Watson with eight prior felony convictions if he chose to testify.[6] Watson's attorney argued one of them, a violation of Penal Code section 243, subdivision (d) (felony battery with great bodily injury), did not involve moral turpitude.[7] He also argued the bulk of the prior convictions should be excluded under Evidence Code section 352 "whether Mr. Watson testifies or not." He explained "the way I anticipate the evidence coming in, that 2002 incident and conviction [for evading arrest] will become evident to the jury one way or the other, and my point being, going beyond that, under 352, it becomes cumulative to introduce all of these. . . ." The court indicated it had "engaged in the balancing test as required by Evidence Code

[6] The prosecutor identified seven prior convictions in his motion, and the court granted his motion to add an eighth at the hearing.

[7] That conviction was one of the three the trial court excluded.

section 352 and find that it is not unduly prejudicial to admit . . . five given that three are not being admitted."

The only prior conviction to which Watson's counsel did not object was the 2002 conviction for evading arrest. Watson, however, has not demonstrated that conviction was inadmissible. It was a prior felony involving moral turpitude, (*People v. Dewey* (1996) 42 Cal.App.4th 216, 222), and the court engaged in the Evidence Code section 352 analysis. Further, as we discuss in the next section, evidence of the facts underlying that conviction was relevant to Watson's defense. Because the record fails to "affirmatively disclos[e] no rational tactical purpose for counsel's act or omission," we find no basis for reversal. (*People v. Montoya*, *supra*, 149 Cal.App.4th at p. 1148.)

Watson likewise claims his counsel was ineffective in not seeking a limiting instruction restricting use of his prior convictions to impeachment. The record reflects two tactical reasons. First, defense counsel specifically rejected CALCRIM No. 375, which limits a jury's consideration of a defendant's uncharged offenses to issues such as motive or intent. Defense counsel explained he did not want to "unduly highlight" Watson's prior crimes. Second, as fully discussed in the next section, part of Watson's defense theory relied on the fact he was the subject of a police manhunt based on allegations he kidnapped his ex-wife, evaded police and was on parole to show he was fleeing from police before the murder, not because of the murder. Additionally, Watson's prior robberies of Whitney were relevant both to show motive and to his defense theory that Whitney was more valuable to him alive than dead. Thus, the record reflects no ineffective assistance of counsel in this regard.

3. Evidence of Watson's Prior Bad Acts

Watson claims his counsel was ineffective in introducing evidence himself and failing to object to admission of evidence regarding the underlying details of his evading police conviction, the allegations he kidnapped his ex-wife, his methamphetamine dealing and his robberies of Whitney and Stoll, and his parole status. He urges all evidence of these prior acts should have been excluded under Evidence Code section 1101.

Evidence Code section 1101 provides in part: "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Evidence of prior crimes or misconduct may be admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .)." (*Id.*, § 1101, subd. (b).) The facts that may be proved are not limited to those listed in section 1101. (*People v. Catlin* (2001) 26 Cal.4th 81, 111.) "[A] fact—like defendant's intent—generally becomes 'disputed' when it is raised by a plea of not guilty . . . ." (*People v. Rowland* (1992) 4 Cal.4th 238, 260.)

The majority of the evidence to which Watson now objects was relevant to his defense. Evidence that Watson was on parole and the subject of a massive manhunt based on the allegations he kidnapped his ex-wife and evaded police prior to Whitney's killing was relevant to show Watson was already fleeing from police for reasons other than a consciousness of guilt of Whitney's murder. His attorney made that point in his closing argument: "The fact that he fled cannot prove guil[t] by itself. That is even more significant in this case because from June 17th on, Ken Watson was fleeing from one safe house to another . . . having nothing to do with the murder." The evidence Watson was on the run from police before Whitney's murder also supported Watson's defense claim that he got the scratches on his face and body while running through underbrush from the police on July 4 and 5, not on the night of the murder. And, evidence of the ongoing manhunt for Watson during that time period was also relevant to his defense theory that he was trying to stay "under the radar" during that time period, not engage in high-profile activities.

Watsons's threats to Whitney before the murder were relevant and properly admitted. "A defendant's threat against the victim . . . is relevant to prove intent in a prosecution for murder." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 757.) Evidence of Watson's robberies of Whitney and the circumstances surrounding them were not only relevant to a motive for killing Whitney (Whitney was moving in on his drug dealing

territory) but also relevant to his defense that Whitney was "more valuable to him . . . alive," (as a person who was an "easy target" to rob of drugs and money) than dead. As Watson's attorney argued, "Why in the world would Ken Watson want to kill Damon Whitney when Damon was good for money and . . . an easy target?"

At oral argument, Watson's counsel focused on his trial counsel's failure to object to the testimony regarding Watson's involvement in a robbery of Ryan Stoll at Dichoso's apartment about a month before the murder. Whitney and Stoll were visiting Dichoso when Watson and Quintero arrived at the apartment and robbed Stoll of money and a pound of methamphetamine.

Evidence of this incident was not simply of an unrelated robbery, but was part of his defense theory that it was accepted in his group to rob others of cash and drugs yet still remain on good terms with them. Watson testified after his first robbery of Whitney, "we talked actually, and it's hard to explain. Just like after the first time I robbed Ryan, Ryan Stoll, started hanging out with me. [¶] These are some really weird type of situations. You normally don't be around the people you rob, but this is the kind of a situation it is. It's very—even though it seems violent and out of control, it's a very nonviolent situation compared to if you were dealing with a different character of people." The evidence was also consistent with Watson's defense that Whitney was more valuable to him alive as an easy source of cash and drugs. Stoll and Whitney were together at Dichoso's apartment, and it was apparent Watson somehow knew in advance who had money and drugs. Dichoso testified he had just been paid and his money was in plain view on his bed in the studio apartment, but was not taken.

Watson's trial counsel's choice not to object to evidence of various aspects of Watson's criminal lifestyle in the month leading up to the murder was also part of a larger tactical scheme to convince the jury Watson's denial of involvement in Whitney's killing was credible because he was willing to honestly admit he had committed other crimes. As his counsel explained the evidence of Watson's other crimes in his closing argument: "He's admittedly guilty of evading police officers, robbery, assault, and he even told you he broke into some people's houses when he was . . . on the run trying to

evade police officers. He did all those things. He told you about all of those things. He was frank with you about all of those things that he did. But the one thing he didn't do was murder Damon Whitney."

Watson also claims his attorney was ineffective because he was the first to elicit the fact that while Watson was wanted for kidnapping his ex-wife in June, the charge was ultimately dismissed. It is an accepted trial tactic for defense counsel to be the first to mention or introduce damaging evidence, both to remove its "sting" and to discredit it. (*People v. Rich* (1988) 45 Cal.3d 1036, 1100.) That is precisely what Watson's counsel did.

"An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 540.) Trial counsel's reasonable defense tactics in regard to this evidence are readily apparent from the record.

4. Failure to Exclude Evidence Based on "Chain of Custody" Issues

Watson asserts his counsel was ineffective in failing to move to exclude the muddy clothing with his DNA and Egyptian bullet found at the Foothill house, and the Egyptian bullet Brahy testified he found in Dichoso's apartment. He claims his attorney should have objected to their admission on the grounds of inadequate chain of custody and possible contamination. Watson maintains the clothing could have been altered or contaminated by Bell or "[a]ny person who had access to the [police] garbage can," and that Brahy could have given "any bullet" to police.

" ' "The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the

evidence and let what doubt remains go to its weight." ' " (*People v. Lucas* (1995) 12 Cal.4th 415, 444, quoting *People v. Diaz* (1992) 3 Cal.4th 495, 559.)

Many witnesses saw Watson wearing the tan shorts on July 9, and Watson testified the shorts were his. Bell testified she found the clothing at the Foothill house on July 10 and recognized it as Watson's. The clothing she recognized and described was the same clothing she and other witnesses testified they saw Watson wearing when he left the Foothill house on July 9 and later that day; a red and white shirt and a pair of tan shorts. Thus, Watson's claim of potential tampering or "contamination" of his own shorts with his DNA is the "barest speculation." (*People v. Lucas, supra,* 12 Cal.4th at p. 444.)

Watson also claims a chain of custody error in the court's admission of evidence of the Egyptian bullet found by Brahy on Dichoso's apartment floor.[8] He claims there were missing links in the chain of custody such that the "bullet could have been any bullet that Mr. Dichoso or Mr. Brahy or anybody else decided to give to the police." It was not, however, "any bullet"; it was an Egyptian military bullet rarely seen in the United States. As such, Watson's claim that Dichoso or Brahy could have obtained an Egyptian bullet and immediately given it to police after the phone call with Brahy on July 10 is likewise the "barest speculation." The issue as raised by Watson is regarding credibility of the witnesses, not chain of custody. It was for the jury to assess whether Dichoso and Brahy were credible witnesses in this regard.

Even were there a chain of custody error, the record does not establish that counsel was incompetent in failing to object on this ground to the admission of the evidence. " '[T]he mere fact that counsel, had he [or she] chosen another path, "might" have convinced the court to issue a favorable evidentiary ruling, is not enough to carry defendant's burden of demonstrating [incompetence]. . . .' " (*People v. Lucas, supra,* 12 Cal.4th at p. 445, quoting *People v. Jennings* (1991) 53 Cal.3d 334, 379-380.)

We cannot conclude the evidence was inadmissible, or that there was not a sound trial strategy for declining to object to admission of the clothing. As with all the evidence

[8] Watson's counsel unsuccessfully sought to exclude this evidence.

to which Watson now asserts chain of custody issues, his trial counsel vigorously argued the evidence should be accorded little weight. The record reflects no error in admitting the evidence or ineffectiveness in failing to object.

5. Failure to Seek a Change of Venue

Watson also maintains his counsel was ineffective in not seeking a change of venue. Watson claims he was "notorious" in San Mateo County based on the pretrial publicity, and asks this court to "take note of the attached newspaper stories,"[9] which he claims tainted the prospective jurors. He also argues he was a well-known figure because he had been a college football star at U.C. Berkeley.

Section 1033 provides, in part, "In a criminal action pending in the superior court, the court shall order a change of venue: [¶] (a) On motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (§ 1033, subd. (a).) The court considers five factors in making that determination: " ' "(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim." ' [Citation.]" (*People v. Farley* (2009) 46 Cal.4th 1053, 1082.)

Consideration of these five factors militates against a change of venue. Though the nature and gravity of the charged offense was great, "[t]he same could be said . . . of most capital crimes, and . . . this factor is not dispositive." (*People v. Farley*, *supra*, 46 Cal.4th at p. 1083.) Some witnesses mentioned seeing broadcasts about the murder or manhunt, but the nature and scope of the coverage is not in the record. The few newspaper articles in the record were written after Watson's trial began and are "largely factual" rather than inflammatory, a factor the court may consider. (*Ibid.*) The community, San Mateo County, is large; "11th most populous in this state, with a geographically dispersed and economically diverse population," a factor weighing against

[9] Even were any newspaper articles attached, Watson has not demonstrated they are a proper subject of judicial notice. (See Evid. Code, §§ 451, 452.)

the need for a change of venue. (*People v. Sully* (1991) 53 Cal.3d 1195, 1237.) Watson concedes Whitney was not a prominent member of the community.

Watson asserts newspaper articles about the murder emphasized he was a former "star football player." The newspaper articles in the record state Watson was a high school football player in San Mateo County in the 1980s, and a college football player at U.C. Berkeley in the 1980s. Any fame he once had in that regard has been dissipated by the passage of time. (*People v. Sully*, *supra*, 53 Cal.3d at p. 1237.)

While the jury voir dire is not part of the record, the record reflects the trial court indicated prospective jurors would be questioned about "prior knowledge about this case." The record does not reflect how many peremptory challenges were utilized, but indicates two prospective jurors were excused for cause.

There is simply no evidence in the record before us that any of the jurors were aware of any pretrial publicity about the murder, which occurred six years prior to trial. Likewise, there is no evidence that Watson's status in the community as a college football player in Alameda County in the 1980s had any negative impact on his ability to receive a fair trial in San Mateo County in 2008. Watson has not shown his counsel to be ineffective in failing to seek a change of venue.

B. Three-Year Delay in Charging Watson with Murder

Watson asserts his constitutional rights were violated and he was prejudiced by the three-year delay between the date of Whitney's killing and his arrest for the murder, which he raised in his motion to set aside the verdict.[10] His primary claim of prejudice is the death of three witnesses who he claims would have testified regarding his alibi for the night of the murder, and one who he claims might have testified the Ford Explorer was outside his home on the night of the murder.

[10] Though Watson describes this issue as the denial of his right to a speedy trial, he only raises issues regarding pre-charging delay, a due process concern. (See *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 910.) Watson waived his right to speedy trial on October 3, 2006.

"The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. . . . A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt." (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at pp. 914-915.)

"Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107.) " 'Prejudice may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.' " (*Ibid.*, quoting *People v. Morris* (1988) 46 Cal.3d 1, 37, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, 545, fns. 5 & 6.) We review the trial court's finding as to whether prearrest delay is unreasonable and prejudicial for substantial evidence. (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at pp. 911-912.)

Responding to Watson's motion to set aside the verdict on this ground, the prosecutor explained the reasons for the preaccusation delay. "[T]he People waited three years before arresting [Watson] because the seriousness of the offense coupled with the complexity of the investigation warranted the delay. [¶] In the course of the investigation, over [40] witnesses were interviewed and many required re-interviewing on numerous occasions; profiles were created for each of these witnesses; phone records

were subpoenaed and analyzed for over twenty separate phone lines; and firearm, forensic, and DNA experts were utilized (the former living in Michigan). The scope of the investigation was so extensive, and the web of interrelated witnesses and suspects was so complex, that the Millbrae Police Department found itself unable to conclude the investigation and the Sheriff's Office was asked to assist. [¶] In the Spring of 2004, the Sheriff's Office took over primary responsibility for the investigation and additional evidence and information was uncovered. New detectives poured over the thousands of pages of information gathered by the Millbrae Police Department and were able, for the first time, to explain the interrelatedness of all of the witnesses and suspects. To obtain this information, however, investigators spent countless hours analyzing the Millbrae Police Department's records and re-interviewed the majority of the witnesses (including [Bell] who had since moved to Virginia). In the fall of 2005 the Sheriff's Department contacted a firearms expert residing in Michigan. This expert related in an interview that the [nine-millimeter] ammunition used in the murder . . . was rare Egyptian military surplus. The expert's testimony as to how and when the rounds entered the country, their unavailability for retail sale, and their rarity established a signature crime that linked [Watson to the murder] . . . . [¶] Once the rarity of the Egyptian rounds was revealed, a pair of shorts found lying on top of a matching [nine-millimeter] round at the Foothill house gained new importance and were tested for DNA. The DNA results, completed in October of 2005, matched to the [d]efendant and proved to be a critical piece of evidence at the trial because it established a link between the [d]efendant, the rounds, and the crime scene. [¶] At the close of a three year long investigation, which required the resources of two police agencies; experts in various fields; and the interviewing, re-interviewing, and profiling of over 40 witnesses the [P]eople felt confident that a strong circumstantial case could be made against the [d]efendant and filed charges."

The trial court denied Watson's motion, finding the prosecutor's justification for the delay in filing charges "far outweighs the defendant's asserted prejudice." Our review of the complicated trail of evidence in this case leads us to the same conclusion. The witnesses were not only numerous, but many were initially uncooperative because of

fear or their own criminal involvement. The witnesses included two groups of methamphetamine users in San Mateo County, only some of whom knew each other, who were connected in a confusing web of family relations, friendship and drug dealing. The physical evidence in the case included rare bullets, the significance of which were not immediately realized, DNA requiring time-consuming testing, and the Ford Explorer and its contents. As Watson asserts, the evidence showing he murdered Whitney was circumstantial, and accordingly it took substantial time to analyze and piece together.[11]

Watson's claim of prejudice, in contrast, is regarding four potential alibi witnesses who died before trial. Watson claims prejudice based on the deaths of four individuals he asserts would have corroborated his testimony. Both Lucille Vaden and her son Danny Vaden died prior to trial, in October 2005 and October 2004, respectively. Jorge Bandala died in August 2003, and Kimble Murray died in August 2006.

"[I]t is . . . proper for the court in the balancing process to consider the possibility that the purported testimony of . . . deceased alibi witnesses has been fabricated." (*Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 954.) Kimble Murray, who Watson claims would have testified he was with him when his uncle dropped him off at Lucille Vaden's house on the evening of July 9, died almost a year after charges were filed, so any prejudice was not solely attributable to pre-charging delay. Lucille and Bobby Vaden, who lived together in San Francisco, were relatives of Watson who he asserted would testify he spent the night at their home. Given the unlikelihood that three witnesses who Watson claimed could corroborate his alibi testimony were dead and the "inconsistent and almost not understandable"[12] testimony of Greg Watson, who Watson

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[11] Watson's trial counsel acknowledged this in his declarations in support of three motions to continue the trial, noting the prosecutor provided him with discovery including 60 tape recordings of potential witnesses resulting in over 2,000 pages of transcripts; "considerable investigation" and "[e]xtensive forensic work" would be required, including interviewing or re-interviewing witnesses who were difficult to locate due to their lifestyles, passage of time, incarceration, and uncooperativeness.

[12] The trial court characterized the testimony of the alibi witnesses (Greg Watson and Michael Scott) as "inconsistent and almost not understandable," and we do not disagree.

claimed drove him to Vaden's and picked up Kimble on the way, the court properly considered the possibility of fabrication of Watson's alleged alibi.

Watson claims the fourth potential witness, Jorge Bandala, "may have been able to testify as to the presence of the [g]old [E]xplorer at his apartment complex after [a]ppellant left with [his uncle] to go to San Francisco." The claim as to Bandala is even more tenuous: there is no evidence Bandala was at home the evening of July 9 or was in a position to see the Explorer parked somewhere "at his apartment complex." Watson himself testified Bandala did not answer the door when he went there on the 9th.

The court found Watson's claims "rather convenient that at least four people [who] are now deceased . . . the defendant now claims would have been alibi witnesses." Given the other evidence contradicting Watson's testimony that he left the Explorer at Bandala's and got a ride to his aunt's house in San Francisco, there is no reasonable likelihood the testimony of these alibi witnesses would have changed the outcome.

Contrary to Watson's claim, the justification for the delay far outweighed the weak showing of prejudice, and there was no evidence the prosecution delayed to gain an advantage over Watson. The trial court's finding that the prearrest delay was not unreasonable or prejudicial is supported by substantial evidence.

C. Alleged Errors in Admission of Evidence

Evidence of the Destroyed Note at the Foothill House

Watson argues the court erred in admitting evidence of the contents of the note found at the Foothill house on July 10, and that admission of this evidence violated his federal due process rights. He claims its admission was statutorily barred under Evidence Code sections 1521 and 1523, and the court erred in not excluding it under section 352. The court held a hearing under Evidence Code section 402 prior to admitting testimony regarding the contents of the note.

Evidence Code section 1521 provides, in part, "The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of the writing if the court determines either of the following: [¶] (1) A genuine dispute exists concerning material terms of the writing and justice

requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair." (Evid. Code, § 1521, subd. (a).)) Section 1523 provides, in part, "(a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing. [¶] (b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." (Evid. Code, § 1523, subds. (a)-(b).) "A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents of such documents be proved verbatim." (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069.)

Watson asserts there was a genuine dispute regarding the material terms of the writing because "Bell testified that the note said that the [g]old Explorer had run out of gas on highway 92[, while] Zuniga testified that she read the note but never testified [to that fact]." The differences in Bell's and Zuniga's testimony regarding the contents of the note did not reveal a dispute as to its terms, only differences in what each woman saw. Zuniga testified she saw only a portion of the note, "the top, . . . the front part." She testified she "read the top of the note and then gave it to [Bell]." Zuniga "didn't pay attention" to the rest of the note, and "handed it over really fast as soon as [she] read the front of it." She recalled it was a handwritten note, and the part she read said "took some stuff. I owe you. Love Ken." Bell testified the note was signed by Watson and stated the Explorer ran out of gas on Highway 92 and that he was sorry he left the house a mess. The women's testimony regarding the contents of the note was neither inconsistent nor revealed a genuine dispute as to the contents, and so was not made inadmissible by the secondary evidence rule.

D. Denial of New Trial Motion

1. Sufficiency of Evidence

Watson argues the trial court erred in denying his motion for new trial because there was insufficient evidence to support the verdict.

" 'In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court "should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict." [Citation.]' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) We review the trial court's ruling on a motion for new trial for abuse of discretion. Its ruling will not be disturbed on appeal " ' "unless a manifest and unmistakable abuse of discretion clearly appears." [Citation.]' " (*Id.* at pp. 1159-1160, quoting *People v. Davis* (1995) 10 Cal.4th 463, 524.)

Watson claims the evidence was insufficient based on the lack of eyewitnesses to Whitney's killing, as well as the "insufficienc[ies]" of the prosecution witnesses. Specifically, he asserts Geddling, Davidson, Manuel, Webster, Dichoso, Porteous, Bell and Bound all "had reason to be dishonest" and had inconsistencies between their testimony and earlier statements.

Some of the witnesses' initial reluctance to talk to or fully cooperate with police was explained at trial. All of the witnesses Watson claims had reason to be dishonest were involved in some kind of criminal activity at the time of the killing, and testified they did not want any involvement with police. Bell testified she initially did not tell police who responded to her burglary report about the note because she did not want to implicate Watson, and out of fear for her safety. Later, she told police over the telephone she did not remember what was in the note because her husband and his grandmother were there, and she did not "want any part of this." Many of the witnesses had made significant changes in their lifestyle in the six years since the murder and were no longer using methamphetamine. The record contains reasons for the inconsistencies in their statements, but does not suggest any motive for all of them to testify falsely. Contrary to Watson's suggestion, circumstantial evidence is sufficient to support a murder conviction, and there was substantial circumstantial evidence here. (*People v. Samaniego*

(2009) 172 Cal.App.4th 1148, 1172.) While the web of evidence was complicated, it clearly demonstrated motive, premeditation and placed Watson in the vehicle from which the shots were fired on the night of the murder. Watson had robbed Whitney twice in the past and had threatened to kill him the day before the murder. Dichoso, Geddling, Manuel, Brahy and Webster all testified Watson had a gun and threatened to kill Whitney the night before the murder. The trail of the rare Egyptian bullets found in the Explorer, in Dichoso's apartment, and at the Foothill house, along with his clothing and the note he left there, corroborated other testimony and tied Watson to the killing. The trial court stated, in denying the motion for new trial, "the prosecution presented an overwhelmingly convincing case." We find no abuse of discretion.

2. Alleged Discovery of New Evidence

Watson argues the court erred in denying his motion for new trial on the basis of newly discovered evidence in the declaration of John Vierra, filed in support of his motion, which he claims "creates other possible suspects."

The trial court considers the following factors in ruling on a motion for new trial based on newly discovered evidence: " ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Evidence of possible third party culpability need not show " 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

Vierra stated in his declaration he knew a drug deal was going to take place on July 9, 2002, involving Whitney, Alberto Valverde, Jr., and a man known as "Korean Jay." Vierra "was aware of the fact that Valverde and 'Korean Jay' always carried firearms." Vierra declared the two men left his apartment before midnight on July 9, and returned about 3:00 a.m. Later on the morning of July 10 at about 7:00 a.m., Vierra tried to call Whitney but could not reach him. Valverde told him he thought Whitney was dead, and started to cry. He thought Valverde's behavior on July 10 was unusual because Valverde was a "non-emotional significant drug dealer and Norteño gang member." Vierra concluded "[b]ased on this set of circumstances I believe that Valverde was responsible for the Whitney murder and that Whitney was shot prior to any narcotic transaction taking place."

Vierra's declaration contained no evidence linking Valverde or "Korean Jay" to the actual perpetration of the crime. The fact that Vierra knew both men carried guns and were planning to buy drugs from Whitney the night of his murder does not link them to the murder. More than one inference can be drawn from Valverde saying he thought Whitney was dead and his uncharacteristic display of emotion. The "newly discovered" evidence in the Vierra declaration is no more than Vierra's personal suspicion that Valverde killed Whitney, a suspicion he did not share when police attempted to interview him in 2002. Assuming the truth of all the facts stated in Vierra's declaration, there is nothing inconsistent with the evidence that Watson committed the murder. It is not probable that admission of this evidence would lead to a different result on retrial.

Watson has demonstrated no abuse of discretion in the trial court's denial of his motion for new trial.[13]

[13] Watson also urges the trial court erred in denying the motion for new trial on the basis that evidence of the note at the Foothill house and the bullet from Dichoso's apartment were improperly admitted. For the reasons stated in our prior analysis, we find no error.

V. DISPOSITION

The judgment is affirmed.

_____
Banke, J.

We concur:

_____
Marchiano, P. J.

_____
Margulies, J.